

SB 848 A STAFF MEASURE SUMMARY

Senate Committee On Judiciary

Action Date: 04/03/23

Action: Do pass with amendments and requesting referral to Ways and Means. (Printed A-Engrossed.)

Vote: 5-0-0-0

Yeas: 5 - Gelser Blouin, Linthicum, Manning Jr, Prozanski, Thatcher

Fiscal: Fiscal impact issued

Revenue: No revenue impact

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Meeting Dates: 3/1, 4/3

WHAT THE MEASURE DOES:

Prohibits a public body from requiring a person or entity providing architecture, landscape architecture, engineering, photogrammetric mapping, transportation planning, land surveying services or related services to pay for the public body's attorney fees, expert fees, investigation expenses or other costs of defending against a claim involving the professional consultant's services, until after the professional consultant's liability or fault is determined by adjudication, dispute resolution, or settlement agreement. Limits the professional consultant's liability for the public body's costs of defense to the proportionate fault of the professional consultant. Makes contrary contractual provisions unenforceable until after the professional consultant's liability or fault has been determined. Replaces specific types of damages subject to indemnity with the general term "damages."

ISSUES DISCUSSED:

- Duty to defend attorney fees and litigation costs distinguished from indemnification for damages
- Design professionals' insurance does not cover defense of another party
- Design professionals' continued responsibility for own defense
- Examples of smaller firms that turned down work because of risk
- Non-negotiability of certain government contracts; some require promises when responding to Request for Proposals
- Statute of limitations for claims against design professionals is two years, while it is six years for contractors on large projects

EFFECT OF AMENDMENT:

Replaces the measure, except for shortening the reference to damages in ORS 30.140.

BACKGROUND:

"Personal services" include professional consulting services such as architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, and other services set out ORS 279C.100. "Related services" include landscaping, facilities planning, appraisal services, hazardous substance testing, project construction or management, and land use planning services, among other things. Governmental bodies, private builders, and prime contractors commonly have construction agreements that require subcontractors to defend and indemnify them in the event of a lawsuit or a claim that a person or property was damaged by the construction or the design of the construction. Indemnification generally refers to liability for damages in a lawsuit. The party requiring another to indemnify it is the indemnitee and the party who has the obligation to indemnify is the indemnitor. The duty to defend typically includes payment for defense counsel and other costs of defending against a lawsuit. Existing law specifies that an indemnitee may not require an indemnitor to defend and indemnify the indemnitee for the indemnitee's own fault; the duty only extends to those damages which arise from the indemnitor's fault or the indemnitor's subcontractor's fault. However, a person who has the duty to

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defend another may be required to pay up front for the defense costs of the party to whom the duty is owed.

Senate Bill 848 A limits a professional consultant's duty to defend a public body in a construction agreement to the professional's proportionate fault after that fault has been determined in an adjudication or other resolution.